

Title	<b>Sealed Records (amend Cal. Rules of Court, rules 12.5, 243.1, and 243.2)</b>
Summary	California's statewide rules on the sealing of court records would be amended to clarify the law relating to the standard for unsealing records and to improve the procedures for sealing and unsealing records.
Source	Appellate Advisory Committee Civil and Small Claims Advisory Committee
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Discussion	<p><u>Introduction</u></p> <p>The first set of uniform statewide rules on the filing of records under seal (Cal. Rules of Court, rules 12.5, 56, and 243.2–243.4) were adopted effective January 1, 2001. These rules have been of substantial assistance in providing guidance to the trial and appellate courts on the proper procedures for handling records to be filed under seal.</p> <p>Some stylistic changes were made to appellate rule 12.5 last year. Also, a set of trial court rules relating to the filing, unfiled, and management of sealed records in False Claims Act cases were adopted. However, most of the sealed record rules have not been changed. There have recently been some suggestions for clarifying and improving the sealed records rules. To consider these proposals and because the sealed record rules have been in effect for a couple of years, it is appropriate to undertake a general review of the rules at this time.</p> <p>The principal issues addressed by the proposed rule changes are (1) clarifying the standard for unsealing records in the trial and appellate courts, and (2) providing a party whose purportedly confidential documents were obtained through discovery with notice and an opportunity to request a sealing order in the trial court when another party intends to use the documents for adjudication, but does not intend to request that they be sealed. Commentators have suggested some additional matters that may warrant amendments to the rules. These are discussed below.</p> <p><u>Amendments Relating to Both Trial and Appellate Courts</u></p> <p><i>Unsealing of Records</i></p> <p>One of the main proposals for changing the rules concerns the provisions on unsealing of records. In both the trial and appellate rules,</p>

a new provision would be added stating: "In determining whether to unseal a record, the court must consider the matters addressed in rule 243.1(c)–(e)." (Rules 12.5(f)(4) and 243.2(h)(4).) Hence, the rules will clarify that, in *unsealing* records, the trial and reviewing courts must consider that court records are presumed to be open and that they may be sealed only if the standards stated in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178 are satisfied.<sup>1</sup> This standard is different from the standard that must be applied in sealing a record. To seal a record, the court must make express *factual* findings.<sup>2</sup> By contrast, to unseal a record, the court only needs to consider whether the relevant factors are present. A single legal determination (e.g., that there is no overriding interest that overrides the right of public access), or a single fact (e.g., that a claimed privilege has been waived) may be sufficient to warrant unsealing a record.

The trial and appellate rules presently provide that a court may unseal a record on its own motion. If the court intends to do so, it must give notice to the parties. The rules would be amended to add that, if one party files an opposition to unsealing the record, any other party may file a response within 5 days after the filing of the opposition. (Rules 12.5(f)(3) and 243.2(h)(3).)

Another proposed new provision is a requirement that the court must clearly indicate the scope of any order unsealing the record. The following provision would be added to the trial and appellate rules:

The order unsealing a record must state whether the record is unsealed entirely or in part. If the court's order unseals only part of the record, or unseals the record only as to certain persons, the order must specify the particular records that are unsealed, the particular persons who may have access to the record, or both. If in addition to the records in the envelope or container, a court has previously ordered the sealing order, the register of actions, or any other court records relating to the case to be sealed, the unsealing order must state whether these additional records are unsealed.

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<sup>1</sup> The proposed new provision applies to original motions to unseal. Thus, in the appellate courts, it does not prescribe the standard for reviewing a decision to seal by the trial court. This is a separate issue. (See *In Re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292.)

<sup>2</sup> Indeed, under the proposed amended rules, rule 243.1(d) would be changed to make it even clearer that express factual findings are required to seal a record.

(Rules 12.5(f)(5) and 243.2(h)(5).)

*Other Rule Amendments Applicable to All Courts*

Several other changes would be made to both the appellate and the trial court rules on sealed records.

First, the amended rules would authorize parties to request that records be sealed or unsealed by an ex parte application as well as by a noticed motion. (See e.g., rule 12.5(c)(2), rule 12.5(f), rule 243.2(b), and rule 243.2(h).) This change is made in recognition that there are often situations in which a request to seal or unseal a record needs to be made within a shorter time frame than by a noticed motion. For example, when the request to seal records is made not with an underlying motion, but in connection with an opposition or reply, the request to seal generally needs to be presented in an expedited manner, so that it can be considered before the underlying motion. Hence, under certain circumstances, an ex parte application to seal may be the proper means to make a request to seal a record.

Second, the rules would be amended to indicate that requests to unseal may be made by petition, e.g., a petition brought by a non-party. (See rules 12.5(f) and 243.2(h).)

Third, both the appellate and trial court rules would be amended to eliminate ambiguity as to what documents must be served in connection with a motion to seal. A provision would be added stating: "Unless the court orders otherwise, any party that already possesses copies of the records to be placed under seal must be served with a complete, unredacted version of all papers as well as a redacted version." (Rules 12.5(e)(4) and 243.2(b)(2).)

Fourth, the rules would be amended to clarify what happens to lodged records if a request to seal is denied. Currently, the rules state that, if the request is denied, the clerk must return the records to the moving or submitting party. The amended rules would provide that the clerk must return the records to the submitting party "unless that party notifies the clerk in writing within 10 days after the order denying the motion or application that the record is to be filed." (Rules 12.5(e)(7) and 243.2(b)(6).) This additional provision recognizes that a party, who has been unsuccessful in obtaining an order sealing records in connection with a pending motion, may nonetheless want to use the records in connection with that party's underlying motion.

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<sup>3</sup> See James G. Snell and Huong T. Nguyen, "Sealing Records Rules Create Some Ambiguities and Burdens," *San Francisco Daily Journal*, July 17, 2002, page 5.

Finally, in both the appellate and trial court rules, a new provision would be added that states: "Unless the sealing order provides otherwise, it prohibits the parties from disclosing the contents of any materials that have been sealed in any subsequently filed records or papers." (Rules 12.5(e)(9) and 243.2(e)(4).) This provision is intended to eliminate uncertainty about whether the sealing order applies to later filed records and papers.

#### Amendments Relating to Reviewing Courts

In the appellate rules, a new provision would be added clarifying that a sealed record must not be unsealed except by order of the court. (Rule 12.5(f)(1). This is similar to a provision already contained in the trial court rules. (See current rule 243.2(e)(4), which will be relocated to rule 243.2(h)(1).)

#### Amendments Relating to the Trial Courts

In the trial court rules, rule 243.1(d) would be amended to clarify that the court must make express *factual* findings before sealing a record. That is, it must find facts that establish that the standard announced in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178 is satisfied. This requirement, which is stated less clearly in the present version of the rule, would eliminate the problem that some motions and orders for the sealing of records are being stated in conclusory terms.

In the trial court rules, the main new provision is subdivision (b)(3) of rule 243.2. This provision addresses a situation that is not explicitly covered under the existing rules. A party who has obtained documents under a confidentiality agreement or protective order may want to use them in a motion or at trial. That party may not be concerned about whether the documents are filed under seal. But the party who produced the documents in discovery may care a great deal. In this situation, it is desirable to have procedures directing the courts and litigants as to the proper actions to take.

Currently, some courts allow a party seeking to use confidential documents to lodge them conditionally under seal. Then the other party may bring a motion to seal before the underlying motion is heard or the documents are used at trial. Other courts provide that the party seeking to use the documents must notify the other party that it intends to use the documents. Then that other party, if it wants, may file a motion seeking to have the documents filed under seal. And some courts provide for a combination of these approaches.

Rather than each court developing its own procedures for handling such matters, it is preferable to have a uniform procedure on this subject in the California Rules of Court. Hence, new rule 243.2(b)(3) is proposed. This provision would provide a procedure requiring that a party who intends to use for adjudication purposes another party's documents that are subject to a confidentiality agreement or protective order, but does not intend to request that the documents be sealed, musts notify the other party so that it will have an opportunity to file a motion to seal. The party whose documents are involved would then have 10 days within which to bring a motion or application to seal. If no motion or application is filed, the records would be made public. This new provision is based on the San Francisco Superior Court's Local Rule 10.5 and the Santa Clara Superior Court's procedures for handling confidential materials in complex cases.

Some commentators have proposed an alternative procedure. For example, they have suggested that parties to a pending motion should be allowed to stipulate to—and courts should be allowed to enter—protective orders providing that all documents containing information subject to a motion to seal be lodged temporarily in their entirety (without requiring a public redacted version to be filed during the short time that the motion to seal is pending) and that the party designating the information as confidential should be required to file a motion to seal as confidential under rules of court *after* the court's hearing on the substantive motion. Once the rulings on the substantive motion and the motion to seal are decided, the moving party would prepare a public redacted version of the documents in the substantive and sealing motions based on the court's order.<sup>3</sup>

Although this alternative approach would simplify the process of ruling on motions to seal, it raises legal problems. In particular, it seems improper under the First Amendment and inconsistent with the policy of open court records for courts to decide substantive motions based on documents that have been lodged temporarily under seal and are unavailable to the public. The decision-making process of the courts should be open and public. Therefore, courts should rule on whether any documents may be filed under seal *before* proceeding to adjudicate matters on the merits. Accordingly, the advisory committees recommend the adoption of proposed rule 243.2(b)(3) instead of the alternative suggested by the commentators. Comments are invited on this matter.

Attachment

## PROPOSAL

Rules 12.5, 243.1, and 243.2 of the California Rules of Court would be amended, effective January 1, 2004, to read:

### [APPELLATE COURT RULES]

#### **Rule 12.5. Sealed Records**

##### **(a) Application**

This rule applies to sealed records and records proposed to be sealed on appeal and in original proceedings under rule 56, but does not apply to records required to be kept confidential by law.

##### **(b) Definitions**

- (1) “Record” means all or part of a document, paper, exhibit, transcript, or other thing filed or lodged with the court.
- (2) A “sealed” record is a record closed to public inspection by court order.
- (3) A “lodged” record is a record temporarily deposited with the court but not filed.

##### **(c) Record sealed by the trial court**

If a record sealed by the trial court is part of the record on appeal:

- (1) The sealed record must be filed under seal in the reviewing court and remain sealed unless that court orders otherwise under (f).
- (2) The record on appeal must include:
  - (A) the motion or application to seal;
  - (B) all documents filed in the trial court supporting or opposing the motion or application; and
  - (C) the order sealing the record.
- (3) The reviewing court may examine the sealed record.

##### **(d) Record not sealed by the trial court**

1  
2 A record filed or lodged publicly in the trial court and not ordered sealed by  
3 that court must not be filed under seal in the reviewing court.  
4

5 **(e) Record not filed in the trial court; motion or application to file**  
6 **under seal**  
7

- 8 (1) A record not filed in the trial court may be filed under seal in the  
9 reviewing court only by order of that court; it must not be filed  
10 under seal solely by stipulation or agreement of the parties.  
11
- 12 (2) To obtain an order under (1), a party must serve and file a motion  
13 or application in the reviewing court, accompanied by a  
14 declaration containing facts sufficient to justify the sealing. ~~With~~  
15 ~~that motion~~ At the same time, the party must lodge the record  
16 under (3), unless good cause is shown not to lodge it.  
17
- 18 (3) To lodge a record, the party must put the record in a manila  
19 envelope or other appropriate container, seal it, and attach a cover  
20 sheet that complies with rule 44(d) and labels the contents as  
21 “CONDITIONALLY UNDER SEAL.”  
22
- 23 (4) If necessary to prevent disclosure, ~~the~~ any motion or application,  
24 any opposition, and any supporting documents must be filed in a  
25 public redacted version and lodged in a complete version  
26 conditionally under seal. Unless the court orders otherwise, any  
27 party that already possesses copies of the records to be placed  
28 under seal must be served with a complete, unredacted version of  
29 all papers as well as a redacted version.  
30
- 31 (5) On receiving a lodged record, the clerk must note the date of  
32 receipt on the cover sheet and retain but not file the record. The  
33 record must remain conditionally under seal pending determination  
34 of the motion or application.  
35
- 36 (6) The court may order a record filed under seal only if it makes the  
37 findings required by rule 243.1(d)–(e).  
38
- 39 (7) If the court denies the motion or application, the clerk must not  
40 place the lodged record in the case file but must return it to the  
41 ~~moving~~ submitting party unless that party notifies the clerk in  
42 writing within 10 days after the order denying the motion or  
43 application that the record is to be filed.  
44

- 1           (8) An order sealing the record must direct the sealing of only those  
2           documents and pages or, if reasonably practical, portions of those  
3           documents and pages, that contain the material that needs to be  
4           placed under seal. All other portions of each document or page  
5           must be included in the public file.  
6  
7           (9) Unless the sealing order provides otherwise, it prohibits the parties  
8           from disclosing the contents of any materials that have been sealed  
9           in any subsequently filed records or papers.

10  
11       **(f) Unsealing a record in the reviewing court**  
12

- 13           (1) A sealed record must not be unsealed except upon order of the  
14           court.  
15  
16           ~~(1)~~(2) Any person or entity may serve and file a motion, application or  
17           petition in the reviewing court to unseal a record. If necessary to  
18           preserve confidentiality, the motion, application, or petition, any  
19           opposition, and any supporting documents must be filed in both a  
20           public redacted version and a sealed complete version.  
21  
22           ~~(2)~~(3) If the reviewing court proposes to order a record unsealed on its  
23           own motion, the court must mail notice to the parties. Any party  
24           may serve and file an opposition within 10 days after the notice is  
25           mailed or within such time as the court specifies. Any other party  
26           may file a response within 5 days after the filing of an opposition.  
27  
28           ~~(3)~~(4) In determining whether to unseal a record, the court must consider  
29           the matters addressed in rule 243.1(c)–(e).  
30  
31           ~~(4)~~(5) The order unsealing a record must state whether the record is  
32           unsealed entirely or in part. If the court’s order unseals only part  
33           of the record, or unseals the record only as to certain persons, the  
34           order must specify the particular records that are unsealed, the  
35           particular persons who may have access to the record, or both. If  
36           in addition to the records in the envelope or container, a court has  
37           previously ordered the sealing order, the register of actions, or any  
38           other court records relating to the case to be sealed, the unsealing  
39           order must state whether these additional records are unsealed.  
40

41       **(g) References to nonpublic material in public records prohibited**  
42

43           A record filed publicly in the reviewing court must not disclose material  
44           contained in a record that is sealed, lodged conditionally under seal, or  
45           otherwise subject to a pending motion to file under seal.



1 [TRIAL COURT RULES]

2  
3 **Rule 243.1. Sealed records**

4  
5 **(a) [Applicability]**

- 6  
7 (1) Rules 243.1–243.4 apply to records sealed or proposed to be sealed  
8 by court order.  
9  
10 (2) These rules do not apply to records that are required to be kept  
11 confidential by law. These rules also do not apply to discovery  
12 motions and records filed or lodged in connection with discovery  
13 motions or proceedings. The rules do apply to discovery materials  
14 that are used at trial or submitted as a basis for adjudication of  
15 matters other than discovery motions or proceedings.  
16

17 **(b) [Definitions]**

- 18  
19 (1) “Record.” Unless the context indicates otherwise, “record” as used  
20 in this rule means all or a portion of any document, paper, exhibit,  
21 transcript, or other thing filed or lodged with the court.  
22  
23 (2) “Sealed.” A “sealed” record is a record that by court order is not  
24 open to inspection by the public.  
25  
26 (3) “Lodged.” A “lodged” record is a record that is temporarily placed  
27 or deposited with the court but not filed.  
28

29 **(c) [Court records presumed to be open]** Unless confidentiality is  
30 required by law, court records are presumed to be open.  
31

32 **(d) [Express factual findings required to seal records]** The court may  
33 order that a record be filed under seal only if it expressly finds ~~that~~ facts  
34 that establish:  
35

- 36 (1) There exists an overriding interest that overcomes the right of  
37 public access to the record;  
38  
39 (2) The overriding interest supports sealing the record;  
40  
41 (3) A substantial probability exists that the overriding interest will be  
42 prejudiced if the record is not sealed;  
43  
44 (4) The proposed sealing is narrowly tailored; and  
45

(5) No less restrictive means exist to achieve the overriding interest.

(e) **[Content and Scope of the order]**

(1) An order sealing the record must (i) specifically set forth the ~~actual findings~~ order findings that support the order, and (ii) direct the sealing of only those documents and pages, ~~or, if reasonably practicable, portions of those documents and pages,~~ that contain the material that needs to be placed under seal. All other portions of each documents or page must be included in the public file.

(2) Consistent with Code of Civil Procedure section 639 and 645.1, if the records that a party is requesting be placed under seal are voluminous, the court may appoint a referee and fix and allocate the referee's fees among the parties.

**Rule 243.2 Procedures for filing records under seal**

(a) **[Court approval required]** A record must not be filed under seal without a court order. The court must not permit a record to be filed under seal based solely upon the agreement or stipulation of the parties.

(b) **[Motion or application to seal a record]**

(1) A party requesting that a record be filed under seal must file a ~~noticed~~ motion or application for an order sealing the record. The motion or application must be accompanied by a memorandum of points and authorities and a declaration containing facts sufficient to justify the sealing.

(2) A copy of the motion or application must be served on all parties who have appeared in the case. Unless the court orders otherwise, any party that already possesses copies of the records to be placed under seal must be served with a complete, unredacted version of all papers as well as a redacted version.

(3)(A) A party who files or intends to file with the court for the purposes of adjudication or to use at trial records produced in discovery that are subject to a confidentiality agreement or protective order, and does not intend to request to have the records sealed, must:

(i) lodge the unredacted records subject to the confidentiality agreement or protective order and any pleadings, memorandums, declarations, and other documents that

1 disclose the contents of the records, in the manner stated in  
2 (d);

3  
4 (ii) file copies of the documents in (i) that are redacted so that  
5 they do not disclose the contents of the records that are  
6 subject to the confidentiality agreement or protective order;  
7 and

8  
9 (iii) give written notice to the party who produced the records that  
10 the records and the other documents lodged under (i) will be  
11 placed in the public court file unless that party files a timely  
12 motion or application to seal the records under this rule.

13  
14 (B) If the party who produced the documents and was served with  
15 the notice under (A)(iii) fails to file a motion or application to  
16 seal the records within 10 days or to obtain a court order  
17 extending the time to file such a motion or application, the  
18 clerk must promptly remove all the documents in (A)(i) from  
19 the envelope or container where they are located and place  
20 them in the public file. If the party files a motion or application  
21 to seal within 10 days or such later time as the court has  
22 ordered, these documents are to remain conditionally under seal  
23 until the court rules on the motion or application and thereafter  
24 are to be filed as ordered by the court.

25  
26 ~~(2)~~(4) The party requesting that a record be filed under seal must lodge  
27 it with the court under (d) when the motion or application is  
28 made, unless good cause exists for not lodging it or the record  
29 has previously been lodged under (3)(A)(i). Pending the  
30 determination of the motion or application, the lodged record will  
31 be conditionally under seal.

32  
33 ~~(3)~~(5) If necessary to prevent disclosure, the any motion or application,  
34 any opposition, and any supporting documents must be filed in a  
35 public redacted version and lodged in a complete version  
36 conditionally under seal.

37  
38 ~~(4)~~(6) If the court denies the motion or application to seal, the clerk must  
39 return the lodged record to the submitting party and must not place  
40 it in the case file unless that party notifies the clerk in writing  
41 within 10 days after the order denying the motion or application  
42 that the record is to be filed.

1 (c) [References to nonpublic material in public records]  
2

3 A record filed publicly in the court must not disclose material contained  
4 in a record that is sealed, conditionally under seal, or subject to a  
5 pending motion or application to seal.  
6

7 (d) [Lodging of records ~~that a party is requesting be placed under seal~~]  
8

9 (1) ~~The party requesting that a~~ A record that may be filed under seal  
10 must be put ~~it~~ in an manila envelope or other appropriate container,  
11 sealed in the envelope or container, and lodged it with the court.  
12

13 (2) The envelope or container lodged with the court must be labeled  
14 “CONDITIONALLY UNDER SEAL.”  
15

16 (3) The party submitting the lodged record must affix to the envelope  
17 or container a cover sheet that:  
18

19 (i) Contains all the information required on a caption page  
20 under rule 201; and  
21

22 (ii) States that the enclosed record is subject to a motion to  
23 file the record under seal.  
24

25 (4) Upon receipt of a record lodged under this rule, the clerk must  
26 endorse the affixed cover sheet with the date of its receipt and  
27 must retain but not file the record unless the court orders it filed.  
28

29 (e) [Order]  
30

31 (1) If the court grants an order sealing a record, the clerk must  
32 substitute on the envelope or container for the label required by  
33 (d)(2) a label prominently stating, “SEALED BY ORDER OF  
34 THE COURT ON (DATE),” and must replace the cover sheet  
35 required by (d)(3) with a filed-endorsed copy of the court’s order.  
36

37 (2) The order must state whether—in addition to records in the  
38 envelope or container—the order itself, the register of actions, any  
39 other court records, or any other records relating to the case are to  
40 be sealed.  
41

42 (3) The order must state whether any person other than the court is  
43 authorized to inspect the sealed record.  
44

1           (4) Unless the sealing order provides otherwise, it prohibits the parties  
2           from disclosing the contents of any materials that have been sealed  
3           in any subsequently filed records or papers.

4  
5           ~~(4)(5) A sealed record must not be unsealed except upon order of the~~  
6           ~~court.~~

7  
8           (f) **[Custody of sealed records]** Sealed records must be securely filed and  
9           kept separately from the public file in the case.

10  
11          (g) **[Custody of voluminous records]** If the records to be placed under seal  
12          are voluminous and are in the possession of a public agency, the court  
13          may by written order direct the agency instead of the clerk to maintain  
14          custody of the original records in a secure fashion. If the records are  
15          requested by a reviewing court, the trial court must order the public  
16          agency to deliver the records to the clerk for transmission to the  
17          reviewing court under these rules.

18  
19          (h) **[Motion, application, or petition to unseal records]**

20  
21          (1) A sealed record must not be unsealed except upon order of the  
22          court.

23  
24          (2) ~~A party or member of the public, or the court on its own motion,~~  
25          may move, apply, or petition, or the court on its own motion may  
26          move, to unseal a record. Notice of the any motion, application, or  
27          petition to unseal must be filed and served on the all parties in the  
28          case. The motion, application, or petition and any opposition,  
29          reply, and supporting documents must be filed in a public redacted  
30          version and a sealed complete version if necessary to comply with  
31          (c).

32  
33          (3) If the court proposes to order a record unsealed on its own motion,  
34          the court must mail notice to the parties. Any party may serve and  
35          file an opposition written 10 days after the notice is mailed or  
36          within such time as the court specifies. Any other party may file a  
37          response within 5 days after the filing of an opposition.

38  
39          (4) In determining whether to unseal a record, the court must consider  
40          the matters addressed in rule 243.1 (c)–(e).

41  
42          (5) The order unsealing a record must state whether the record is  
43          unsealed entirely or in part. If the court’s order unseals only part  
44          of the record, or unseals the record only as to certain persons, the  
45          order must specify the particular records that are unsealed, the

1                    particular persons who may have access to the record, or both. If  
2                    in addition to the records in the envelope or container, the court  
3                    has previously ordered the sealing order, the register of actions, or  
4                    any other court records relating to the case to be sealed, the  
5                    unsealing order must state whether these additional records are  
6                    unsealed.